FOONG CHOOI PING & ANOR.

v.

SUNGEI WANG PLAZA SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING SUMMONS NO. S7-22-723-90]
19 SEPTEMBER 1991

CIVIL PROCEDURE: *Application by defendant to strike out writ and statement of claim - Whether lawful tenants of disputed premises - Whether entitled to injunction - Claim for damages and indemnity by defendant - RHC 1980, O. 14, O. 18 r. 19.*

CIVIL PROCEDURE: ***Injunction*** *- Entitlement of tenant against landlord - Pecuniary compensation - Whether adequate relief - Specific Relief Act 1950, s. 53(2)*

LANDLORD AND TENANT: *Subletting by tenant - Earlier tenancy entered into with previous owner - Whether subletting binding on new owner - Refusal to deliver vacant possession - Whether entitled to occupy premises as monthly tenants - Whether trespassing - whether relationship of landlord and tenant existed - Pecuniary compensation - Whether adequate relief*

The defendant Sungei Wang Plaza Sdn. Bhd. (SWP), was the developer and registered proprietor of all the commercial, shopping and entertainment complex known as Sungai Wang Plaza. (the said property).

SWP sold 24 units of the shoplots in the complex to CKL and subsequently repurchased the same from CKL pursuant to a sale and purchase agreement dated 27 June 1989.

However CKL, before the completion of the sale and purchase agreement and without the written consent of SWP, had entered into a tenancy agreement with the plaintiffs on 1 August 1989 for a period of 1 year to expire on 30 July 1990 with an option to extend the tenancy for a further year.

SWP had by a letter dated 25 July 1990 approved the extension of the tenancy agreement until 30 September 1990 at the same rental and accepted monthly rentals from the plaintiffs for the months of October and November 1990.

On 13 November 1990 the servants or agents of SWP locked up the disputed premises thereby preventing the plaintiffs from carrying on their business. Again on 23 November 1990, the servants or agents of SWP locked up the premises resulting in losses to the plaintiffs.

SWP alleged that the tenancy agreement entered into between CKL and the plaintiffs expired on 30 July 1990 and they allowed a period of 2 months from 1 August 1990 to the plaintiffs to deliver vacant possession.

The plaintiffs obtained an interlocutory injunction restraining the defendant from further locking up the disputed premises, and also commenced proceedings for losses and damage suffered by them as a result of the locking up.

This was the defendant's application to set aside the injunction, striking out of the plaintiffs' claim and for summary judgment under its counterclaim for delivery of vacant possession of the premises, damages and indemnity.

The issue was whether the plaintiffs were occupying the premises as trespassers and whether they had a right to claim for the losses purportedly suffered by them, against SWP.

Held:

[1] The plaintiffs no longer have any right to restrain the defendant from recovering vacant possession of the disputed premises because they have enjoyed peaceful occupation of the disputed premises from 31 July 1990 to the date of delivery of this judgment, which period is well pass the tenancy period for a further year commencing 31 July 1990. Therefore, the interlocutory injunction is revoked.

[2] The tenancy agreement entered into between the plaintiffs and CKL binds SWP because upon the completion of the sale agreement with CKL on 23 September 1989, SWP had never complained that the tenancy agreement was made without its approval or that it could not bind SWP and that the plaintiffs should vacate the disputed premises.

[3] The omission on the part of SWP to object when the plaintiffs applied to renew the tenancy raises the question of waiver or acquiescence.

[4] Acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. The act of the acceptance of rent was unequivocal and the landlord was held disentitled by attempts to qualify his acceptance by stating that he accepted the rent without prejudice to his rights of forfeiture.

[Interlocutory injunction revoked; defendant's application dismissed with costs.]

Cases referred to:

Wooley v. Broad [1892] 2 QB 317 ***(foll)***
Novotel Soceite etc. v. Pernas Hotel Chain (Selangor) Bhd. [1987] 1 MLJ 210 ***(foll)***
Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor. [1990] 1 CLJ (Rep) 30 ***(foll)***
Doe v. Wilkinson Vol 107 ER 787 ***(folls)***
Oak Property Company Ltd. v. Chopman & Anor. [1947] 1 KB 886 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 r. 19
Specific Relief Act 1950, s. 52(3)

For the plaintiffs - S.T. Lee; M/s. S.T. Lee & Partners.
For the defendant - Christina Chia; M/s. Christina Chia Ng & Partners.

Other sources referred to:
Woodtall an Landlord & Tenant Vol. 1 27th Eon. p.18 para 28

JUDGMENT

Lim Beng Choon J:

On 11 December 1990 the defendant applied by way of summons-in-chambers (encl. 9) for the following orders:

1. That the *ex parte* interim injunction order dated 27 November 1990 be set aside and/or discharged.
2. That the plaintiff's writ and statement of claim be struck off under O. 8 (*sic*) (O. 18?) r. 19 of the Rules of the High Court 1980.

3. That the defendant be at liberty to enter summary judgment against the plaintiffs pursuant to O. 14 of the Rules of the High Court 1980 on its counterclaim for an order that the plaintiffs do deliver vacant possession of the premises known as Lot G095, Lower Ground Floor, Sungei Wang Plaza, Jalan Sultan Ismail, Kuala Lumpur and do pay the defendant double rental from 1 October 1990 to the date of delivery of vacant possession and cost.

4. That the Senior Assistant Registrar be ordered to enquire into and assess the damages suffered by the defendant in comprise of (?) (*sic*) the interim injunction dated 27 November 1990 to be paid by the plaintiffs and (to?) (*sic*) the defendants.

5. That the costs of and incidental to the summons be paid by the plaintiff to the defendant.

The application of the defendant was supported by an affidavit affirmed on 11 December 1990 by Sally Low Geok Choo, the Marketing Executive of the defendant (encl. 8). But before considering the assertions made by the deponent of encl. 8, it is necessary to state the events which led the defendant filing encl. 9.

On 26 November 1990 the plaintiffs instituted an action by writ accompanied by a statement of claim. (Enclosure 2) can be briefly summarised thus:

The defendant was and still is the owner of all the apartments buildings and structures known as Sungei Wang Plaza Kuala Lumpur. Originally the defendant appointed Chong Kok Lim & Sons (Holdings) Sdn. Bhd. (Chong Kok Lim & Sons), to manage the Sungei Wang Plaza project but subsequently the defendant took back management of the said project from Chong Kok Lim & Sons. By an agreement dated 1 August 1989 (hereinafter referred to as the tenancy agreement except otherwise specified) the plaintiffs agreed to rent the disputed premises from previous owner Chong Kok Lim & Sons commencing from 1 August 1989 until 30 July 1990 with an option to extend the tenancy for a further year at a monthly rental of RM2,779 with service charge of RM594.75 and water charge of RM50 per month. By letter dated 25 July 1990 the defendant approved the extension of the tenancy agreement until 30 September 1990 at the same monthly rental as stipulated in the tenancy agreement. Subsequently the defendant also accepted the monthly rentals for the months of October and November 1990. By so doing the defendant had accepted the plaintiffs as monthly tenants of the disputed premises. On 13 November 1990 the servants or agents of the defendant locked up the disputed premises thereby preventing the plaintiffs from carrying on their business in the disputed premises. On 23 November the servants or agents of the defendant again locked up the disputed premises. In the result the plaintiffs suffered losses and they claimed for:

(1) An order of injunction.

(2) Losses suffered by them to be determined by the Court.

(3) Costs.

(4) Further relief as the Court may deem proper to grant.

Simultaneously the plaintiffs applied by way of summons-in-chambers (encl. 4) for an injunction to restrain, the defendant, its agents or servants from locking up the disputed premises and/or to carry out any act contrary to law to prevent the plaintiffs from carrying on their business in the disputed premises. The plaintiffs gave the usual undertaking to the Court regarding damages for wrongful obtaining of the injunction. The application of the plaintiffs for an injunction was supported by an affidavit affirmed by the 2nd plaintiff on 24 November 1990

(encl. 3). A greater part of the assertions of the deponent of encl. 3 are repetitions of what were said in the plaintiffs' statement of claim. However she did make some assertions which were not stated in the said statement and these assertions can be summarised thus:

When the plaintiffs took over the tenancy of the disputed premises from the previous tenant, the latter had been carrying on Hair & Beauty Salon & Video Tape business in the disputed premises. At the time when the plaintiffs took over the tenancy from the previous tenant the previous owner of the disputed premises (I take it she meant Chong Kok Lim & Sons) implicitly knew that the plaintiffs would be carrying on the same business of Hair & Beauty Salon & Video Tape rentals. On 25 July 1990 the plaintiffs by letter requested for an extension of the tenancy agreement and on the same date the plaintiffs received a letter from the defendant stating as the plaintiffs had breached cl. 3(O) of the tenancy agreement which prohibited the defendant from sub-letting, the defendant was not prepared to extend the tenancy agreement but it was prepared to allow the plaintiffs to occupy the disputed premises until 30 September 1990. The plaintiffs must on or before 30 September 1990 surrender vacant possession of the disputed premises to the defendant. The plaintiffs thereupon through their solicitors wrote to the defendant denying that they had been in breach of clause 3(O) of the tenancy agreement and also asserted that the defendant's notice to quit was bad in law and the plaintiffs would not comply with the defendant's notice to quit. On 13 November 1990 the plaintiffs directed their Counsel to contact the Counsel for the defendant to explain that on or about the date of renting the disputed premises the plaintiffs had been carrying on the business of Hair & Beauty Salon and Video Tape business with the full knowledge of the previous owner of the disputed premises. Furthermore when the defendant took over the management of the Sungei Wang Plaza project it also did not raise any objection regarding the business carried on by the plaintiffs. Hence the defendant was stopped from raising the issue at this juncture. The plaintiffs had been paying the monthly rentals of the disputed premises regularly and were never in arrears and did not owe the defendant any money. In fact the plaintiffs had paid the monthly rentals up to November 1990. By virtue of their payments of monthly rentals up to November 1990 the plaintiffs had become monthly tenants of the disputed premises from the cessation of the tenancy agreement on 31 July 1990. In any event the plaintiffs could not be said to be trespassers of the disputed premises- they were and still are monthly tenants according to law.

In its statement of defence and counterclaim, the defendant alleged that the tenancy agreement entered into by the plaintiffs and Chong Kok Lim & Sons expired on 30 July 1990. The plaintiffs therefore requested the defendant for a grace period to deliver vacant possession as they had to look for a buyer of the equipment which they used to carry out their hair beauty salon business. In the result the defendant allowed them a period of 2 months from 1 August 1990 to deliver vacant possession that is to say until 30 September 1990. The plaintiffs were therefore occupying the disputed premises under a licence granted by the defendant for the months of August and September 1990 and thereafter they were occupying the premises as trespassers. As such the plaintiffs had no right to claim for the losses purportedly suffered by them. In fact the plaintiffs had no cause of action against the defendant. In its counterclaim the defendant repeated what were averred in it statement of defence and further alleged that plaintiffs were in breach of the said tenancy agreement in sub-letting part of the disputed premises to a third party without the approval in writing from the former owner of the said premises namely Chong Kok Lim & Sons or from the defendant thereby violating clause 3(O) of the tenancy agreement. Furthermore the said tenancy agreement could not bind the defendant and as such it was not bound to extend

the tenancy period. As a result of the plaintiffs' failure to deliver vacant possession of the disputed premises by 30 September 1990 the defendant suffered losses which were caused by the plaintiffs' default. As the plaintiffs had agreed to deliver vacant possession of the disputed premises by 30 September, the defendant relying on this agreement entered into a tenancy agreement with one Wong Kim Fatt effective as from 15 October 1990. In failing to abide by their agreement the plaintiffs had caused the defendant to breach the tenancy agreement with Wong Kim Fatt who had threatened to sue the defendant for breach of contract. The defendant therefore prayed for an order:

(a) that the plaintiffs and all other occupiers of the disputed premises do deliver vacant possession to the defendant.

(b) the plaintiffs do pay the losses suffered by or double rentals as from 1 October 1990 until the date of delivery of vacant possession to the defendant.

(c) the plaintiffs do indemnify the defendant in respect of any claim which Wong Kim Fatt may make against the defendant.

As stated earlier the application of the defendant to set aside the interim injunction granted to the plaintiffs and to strike out their writ and statement of claim is supported by an affidavit of Sally Low, the marketing executive of the defendant enclause 8. A great part of her assertions in enclause 8 are repetitions of the averments of the plaintiffs in its statement of claim. However she had made some assertions which do not appear in the said statement or which were further elaboration of certain averments of the plaintiffs and I need to reproduce those assertions that are relevant in order to identify the issues raised in the present case.

In her affidavit in enclause 8, Sally Low, asserted that the plaintiffs were not entitled to an injunction as the only relief prayed for by them amounted to damages and as plaintiffs would be sufficiently compensated by damages should they succeed in the action, this was not a proper case for the granting of an injunction. Furthermore the plaintiffs had failed to make a full and frank disclosure to the Court and had falsely misrepresented themselves as the lawful tenant of the disputed premises when in fact they were unlawfully withholding possession of the disputed premises from the defendant and were trespassers of the same. Sally Low then went on to explain as to how the plaintiffs had misrepresented the facts of the case. Firstly she asserted that the defendant was the developer and registered proprietor of all the commercial, shopping and entertainment complex known as Sungei Wang Plaza Complex (hereinafter referred to as "the complex") comprising of 700 shoplots including the disputed premises and the defendant was also the manager of the complex. Apparently the defendant sold 24 units of the shoplots in the complex including the disputed premises to Chong Kok Lim & Sons but subsequently the defendant re-purchased the 24 units from Chong Kok Lim & Sons. In so doing the defendant entered into a sale and purchase agreement dated 27 June 1989 (hereinafter referred to as "the sale agreement"). At the time when the sale agreement was executed the disputed premises was rented to one Hor Choy Heng and the tenancy with this Hor Choy Heng would expire on 30 June 1989. In the sale agreement exhibited by Sally Low in her affidavit as Exh. 'SL1', it was provided that the defendant as purchaser would take the 24 shoplots subject to existing tenancies which included the tenancy granted to Hor Choy Heng. Before the completion of the sale agreement and without the written consent of the defendant, Chong Kok Lim & Sons entered into the tenancy agreement with the plaintiffs on 1 August 1989 letting the disputed premises to the plaintiffs from 1 August 1989 to 30 July 1990. The sale agreement was completed on 23 September 1989 but there was no assignment or novation of the tenancy agreement to the defendant but as a gesture

of goodwill the defendant allowed the plaintiffs to complete the tenancy period that is up to 30 July 1990. When on 22 June 1990 the 2nd plaintiff wrote to the defendant for renewal of the tenancy agreement for the disputed premises the 2nd plaintiff was told by Sally Low personally that she, the 2nd plaintiff, was in breach of clause 3(O) of the tenancy agreement by subletting a portion of the disputed premises without the previous landlord's or the defendant's written consent to carry on video business as the disputed premises was let to the plaintiffs for use as a Hair & Beauty Salon only. In any case as the tenancy agreement was not binding on the defendant as the defendant was neither the assignee nor the successor-in-title of Chong Kok Lim & Sons, the defendant did not take any action against the plaintiffs for breach of clause 3(O) of the tenancy agreement earlier. Sally Low further informed the 2nd plaintiff that the rental for the new tenancy would have to be increased in accordance with the market rate and that the plaintiffs would have to upgrade and renovate the disputed premises. The 2nd plaintiff informed Sally Low that she was not willing to spend on renovation on the disputed premises and that she hoped that the defendant would not increase the rental. The 2nd plaintiff further informed Sally Low that the subletting helped her in paying the monthly rental of disputed premises. The 2nd plaintiff then asked for more time to find a buyer for her equipment if the tenancy agreement could not be extended. Accordingly Sally Low agreed to grant the plaintiffs two months grace period to vacate and deliver vacant possession of the disputed premises to the defendant. The refusal of the defendant to extend the tenancy agreement and the grant of the grace period of two months was subsequently put in writing by letter dated 25 July 1990 sent by the defendant's solicitors on the instruction of the defendant. In response, the plaintiffs through their solicitors wrote on 7 September to the defendant denying that they were in breach of clause 3(O) of the tenancy agreement. The defendant through its solicitors replied on 19 October 1990 insisting that the plaintiffs had breached the said clause 3(O) and further said that the defendant decided not to renew the tenancy agreement and requested the plaintiffs to deliver vacant possession of the disputed premises to the defendant with immediate effect. Both the plaintiffs' letter and the defendant's reply were annexed to Sally Low's affidavit as Exh. "SL6" and "SL7" respectively. As the plaintiffs failed to deliver vacant possession, the defendant again instructed its solicitors to give the plaintiffs' solicitors and all occupiers of the disputed premises 48 hours' notice to vacate the disputed premises. Copies of the defendant's letter giving the necessary notice to the plaintiffs' solicitors and to the occupiers were dated 9 November 1990 and were exhibited in Sally Low's affidavit as Exh. "SL8" and "SL9" respectively. As the plaintiffs continued to ignore the notice to quit, the defendant gave another notice to quit dated 20 November 1990 and the notice was exhibited in Sally Low's affidavit as Exh. "SL10". Upon the plaintiffs' failure to comply with the notices to quit the defendant had no choice but to resort to the common law remedy of self-help by adding a lock outside the disputed premises to prevent the plaintiffs from continuing to trespass on the defendant's property. Sally Low also claimed that the defendant did not accept any payment from the plaintiffs as rental for the months of October and November 1990 although the defendant was entitled to retain any money received by it from the plaintiffs towards account for damages and/or double rental as a result of the plaintiffs' trespassing on the defendant's property. Sally Low also asserted that the plaintiffs had no defence to the defendant's counterclaim.

The plaintiffs had filed a reply and defence to the counterclaim (enclause 12). I do not propose to mention at length the averments set out therein as the plaintiffs' reply and defence to the counterclaim were primarily repetitions of what they had said in the averments contained in their statement of claim. They however did state that the defendant was estopped from

denying that the plaintiffs had the approval of the previous landlord namely Chong Kok Lim & Sons to sub-let the disputed premises and moreover the defendant was fully aware of the said approval and did not take any action against the plaintiffs until the expiry of the tenancy agreement. They also averred that the defendant did accept the monthly rentals for the months of August to November 1990. They also denied that the defendant had suffered any damages. The 2nd plaintiff had earlier on 21 January 1991 filed an affidavit in reply (enclause 11) and in the affidavit they persisted in asserting that they were monthly tenants of the disputed premises. In their affidavit enclause 11 they supported what they subsequently averred in the reply and defence to the counterclaim. However they did further assert in enclause 11 that in any case the defendant had no right to let out the disputed premises to Wong Kim Fatt so long as the plaintiffs remained as monthly tenants of the disputed premises.

In considering whether the plaintiffs were right in applying for and obtaining the interlocutory injunction I took note of the fact that all that the plaintiffs are claiming for are losses or damages purported to have been suffered by them as a result of the defendant locking up the disputed premises on 13 November 1990 and again on 23 November 1990. There are no other reliefs requested for such as a declaration that under the tenancy agreement and by the conduct of the defendant, the plaintiffs are entitled to occupy the disputed premises as a monthly tenant for a further year that is from 30 July 1990 to 30 July 1991. The averments contained in their statement of claim are all geared towards sustaining their claim for such losses and damages. They are therefore bound by their pleadings and they cannot go into any matters not included in their pleadings (see for example *Wooley v. Broad* [1892] 2 QB 317 and *Novotel Soceite etc. v. Pernas Hotel Chain (Selangor) Bhd.* [1987] 1 MLJ 210. That being the case the plaintiffs are not entitled to obtain the interlocutory injunction. Thus in *Associated Tractors Sdn. Bhd. v. Chan Boon Heng & Anor.* [1990] 1 CLJ (Rep) 30, Hashim Yeop A. Sani SCJ said at p. 32:

> But it would seem quite clear that the most important factor to consider as a matter of principle is the question of whether in lieu of the injunction damages would be an adequate and proper remedy because in the matter of injunctions and exercising its jurisdiction the Court acts upon the principle of preventing irreparable damage. As Lindley LJ said in *London & Blackwell Rly Co. v. Cross* at p. 369:
>
> > The very first principle of injunction law is that you do not obtain injunctions for actionable wrongs from which damages are the proper remedy.

Section 52(3) of the Specific Relief Act 1950 clearly provides that:

> 52(3). Where the defendant invades or threatens to invade the plaintiff's right to enjoyment of property, the Court may grant a perpetual injunction in the following case:
>
> (a) -
>
> (b) -
>
> (c) where the invasion is such that pecuniary compensation would not afford adequate relief.

In the present case it cannot be said that pecuniary compensation would not afford adequate relief for the simple reason that the plaintiffs are in fact asking for compensation as their only relief. In any event the interlocutory injunction granted to the plaintiffs on 27 November 1990 was to restrain the defendant its servants or agents from locking up the disputed premises or to use any unlawful means of preventing the plaintiffs from continuing to carry on their business in the disputed premises. By now the plaintiffs have no longer any right to restrain the defendant from recovering vacant possession of the disputed premises simply because

they have enjoyed peaceful occupation of the disputed premises from 31 July 1990 to the date of delivery of this judgment which period is well pass the tenancy period for a further year commencing from 31 July 1990. The written submission of Counsel for the plaintiffs was delivered to this Court on 12 August 1991 and even by then the plaintiffs must in any case deliver vacant possession of the disputed premises to the defendant. For the above reasons I hereby revoke the interlocutory injunction issued by the Court on 27 November 1990 to the plaintiffs who must pay the costs of the proceedings.

Turning to the application of the defendant to strike out the writ and statement of claim of the plaintiffs and its request for an O. 14 judgment in respect of its counterclaim, it is obvious that there is no necessity for me to consider its prayer for an order directing the plaintiffs and all occupants to vacate and to deliver vacant possession to the defendant for the same reason as stated earlier, that is the tenancy agreement must at any rate have expired by 30 July 1991. The defendant therefore has every right to require the plaintiffs and all occupants to vacate and deliver vacant possession of the disputed premises to the defendant. The only matters that I need to deal with is the application for striking out the writ and statement of claim of the plaintiffs and the damages and indemnity claimed by the defendant in its counterclaim.

In considering these two matters it would appear that the tenancy agreement entered into between the plaintiffs and Chong Kok Lim & Sons binds the defendant simply because upon the completion of the sale agreement with Chong Kok Lim & Sons on 23 September 1989 the defendant had never complained that as the tenancy agreement was made without its approval, it therefore could not bind the defendant and that the plaintiffs should vacate the disputed premises. On the contrary the defendant allowed the plaintiffs to occupy the disputed premises and received the monthly rentals pursuant to the tenancy agreement. It follows that with the adjournment of the tenancy by the plaintiffs tendering monthly rentals to the defendant which were duly accepted by the defendant, the relationship of landlord and tenant was created between the plaintiffs and the defendant. Thus in the case of *Doe v. Wilkinson* Vol. 107 ER 787, the defendant enclosed a small piece of land by the side of a public highway and occupied it for thirty years without payment of rent. At the expiration of that time the owner of the adjoining land demanded rent which the defendant paid on several occasions. In bringing an action of ejectment by the owner it was held:

> Here the payment of rent was an acknowledgment that the occupation was by permission. Had the defendant known that lessor of the plaintiff could not otherwise approve a tenancy, it is probable that he would not have paid the rent; but having paid it, the tenancy is acknowledged.

The author of *Woodfall on Landlord & Tenant* Vol. 1 27th Edn., p. 18 para. 28 too commented that payment of rent is an acknowledgment of tenancy, and **is conclusive** in the absence of other evidence. In any case if as suggested by the defendant that the tenancy agreement could not bind it, then it must follow that it could not rely on clause 3(O) of the tenancy agreement and its assertion that the plaintiffs were in breach of the said clause as a basis for the non-renewal of the tenancy for a further year. The defendant cannot be allowed to blow hot and cold at the same time. The defendant therefore has itself raised a triable issue as to whether its refusal to extend the tenancy based on the purported breach of clause 3(O) of the tenancy agreement and the subsequent notices to quit are lawful.

The second point which I took into consideration was that as the plaintiffs had sub-let the disputed premises to someone to carry on video tapes rental business, if not upon entering into the tenancy agreement with Chong Kok Lim & Sons at least soon after their occupation

of disputed premises, Chong Kok Lim & Sons must have known of such sub-letting. When the defendant bought over the disputed premises and bearing in mind that the defendant was also managing the Sungei Wang Plaza Complex it must have known or at least ought to have known of the sub-letting. Yet the defendant did nothing about it until the plaintiffs applied to renew the tenancy. This act or omission on the part of the defendant raises the question of waiver or acquiescence in accordance with the principle laid down in *Oak Property Company Ltd. v. Chopman & Anor*. [1947] 1 KB 886 where it was said at p. 898:

> By the common law, which tended to construe forfeiture provisions as effective to render leases voidable and not void, a landlord was bound, as soon as he was fully aware of non-continuing breach of covenant by the tenant entitling the landlord to avoid the lease, to elect at once for or against avoidance, and to notify the tenant if he made the former election. On this principle acceptance of any rent accrued due after the landlord's knowledge of the tenant's breach was regarded necessarily as inconsistent with an election to avoid the lease and consistent only with its affirmance. The acceptance of the rent being, in the circumstances, an unequivocal act, waiver of the breach followed, according to Parker J in *Matthews v. Smallwood* as a matter of law; and so unequivocal was the act of acceptance of rent that the landlord was held disentitled to get the best of both worlds by attempts to qualify his acceptance, for example, by stating that he accepted the rent without prejudice to his rights of forfeiture; see the notes in Smiths's Leading Cases to *Dumpor's* case, 13th Edn., Vol. 1, pp. 34 *et seq*.

Here again is a triable issue which cannot be resolved at this stage.

From what has been discussed above I hold that the defendant's application to strike out the plaintiffs' writ and statement of claim cannot succeed; neither can the defendant be granted an O. 14 judgment considering that the plaintiffs have a *bona fide* claim regardless of whether their claim is a strong or a weak one. I therefore dismissed the application of the defendant with costs.

Also found at [1992] 1 CLJ 125